

April 15, 1991

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

ITEM 601 ON DOCKET OF APRIL 12, 1991
CERTIFICATION OF JOINT EIR/EIS
REGARDING SECONDARY TREATMENT

During the debate of the item referenced above and as proposed in a letter by Elmer A. Keen, we were asked whether the Council could certify the EIR/EIS and request a supplemental EIR on the "no project alternative" discussed in the existing EIR/EIS.

Because of both the complexity of the project and the question, we must establish a context to this question. The California Environmental Quality Act (CEQA, Public Resources Code section 21000 et seq.) requires an Environmental Impact Report as an informational document to inform public agency decisionmakers and the public generally of the effect of a project, possible ways to minimize the effect, and describe reasonable alternatives to the project. Title 14, California Administrative Code section 15121. The alternatives are to be surveyed against a "rule of reason" to permit a reasoned choice. "An EIR need not consider an alternative whose effect cannot be reasonably ascertained and whose implementation is remote and speculative." 14 California Administrative Code section 15127(d)(5).

Utilizing this standard our Memorandum of Law of November 8, 1989 (attached) concluded that no EIR need consider in any detail the "no project alternative" of not complying with the Clean Water Act because such an alternative was illegal and legislative changes altering the compliance standard were "remote and speculative." Further, our Memorandum of Law of April 13, 1990 (attached) dealt with the effects of certification of an EIR. There we concluded, and reaffirm, that certification is NOT equivalent to approval or endorsement of the project.

Today we are asked an extended inquiry on whether certification can be followed by a supplemental EIR. Here we must tread with caution.

Section 15090. Certification of Final EIR.

The lead agency shall certify that:

- (a) The final EIR has been completed in compliance with CEQA; and

(b) The final EIR was presented to the decisionmaking body of the lead agency and that the decisionmaking body reviewed and considered the information contained in the final EIR prior to approving the project.

14 California Administrative Code section 15090.

The certification of the EIR then requires two (2) steps:

(1) a determination that the EIR was completed in compliance with CEQA; and (2) the information was reviewed and considered prior to approval of the project. A certification of a legally deficient document because it failed to adequately discuss an issue would constitute a prejudicial abuse of discretion and subjects the action to invalidation in the courts. *Citizens to Preserve the Ojai v. County of Ventura*, 176 Cal.App.3d 421, 428 (1985).

Hence, in our view the certification of this EIR without a finding that all issues, including the "no project alternative," have been adequately addressed could subject the document to judicial invalidation. Therefore, to certify the EIR just to meet the Consent Decree deadline of April 15, 1991 while simultaneously calling for a supplemental EIR on the "no project alternative" would be tantamount to finding the EIR incomplete and therefore not adequately addressing all the issues as required by CEQA. 14 California Administrative Code 15090; Guide to the California Environmental Quality Act, 1990 Edition, p. 119.

That is not to say, however, that subsequent EIRs cannot be prepared. Indeed, the regulations expressly recognize post-certification activity by "supplement to EIR or addendum to EIR."

14 California Administrative Code section 15163; 15164.

In some instances, changes to a proposed project or its surrounding circumstances subsequent to the certification of an EIR necessitate the preparation of either a "subsequent EIR" or a "supplement to an EIR." (Section 21166; Guidelines, sections 15162, 15163; see section X(C)(1) *infra*, for a discussion of "supplements to EIRs.")

Agencies' ability to prepare such documents allows projects to be modified in response to changed circumstances and new information without requiring that the environmental review process must begin again completely anew. (Emphasis added.)

Guide to the California Environmental Quality Act, p. 198.

However, the Council could in conjunction with EIR certification or anytime thereafter request that further information be prepared to support legislative changes in the Clean Water Act or pursuit of a 301(h) waiver. Such information could trigger a supplement to an EIR.

Section 21166. Subsequent or supplemental impact report; conditions

When an environmental impact report has been prepared for a project pursuant to this division, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs:

(a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.

(b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.

(c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.

Public Resources Code section 21166.

This section confirms that CEQA is not a static process designed to freeze the reviewed proposal in a time capsule. Rather, as new information and insights are developed, CEQA provides a mechanism for incorporating them into the approved project or revising the approved project. *County of Inyo v. City of Los Angeles*, 71 Cal.App.3d 185, 199 (1977).

CONCLUSION

The present EIR may be certified only if it is affirmatively found to adequately review all of the appropriate alternatives. Certification on the condition of a supplemental EIR on the "no project alternative" presents the taint of incompleteness that could render certification vulnerable to judicial invalidation. The Council is free to direct development of further information that could lead to a post-certification supplemental EIR should new information be developed that bears on the environmental impact of the project.

Respectfully submitted,

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Attachments:2
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